United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

74-2592

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

PETER BARTOK,

Plaintiff-Appellant,

-against-

BOOSEY AND HAWKES, INC., and
BENJAMIN SUCHOFF, as Trustee
of the Estate of Bela Bartok,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE,
BOOSEY AND HAWKES, INC.

FISHBEIN & OKUN
Attorneys for Appellee,
Boosey and Hawkes, Inc.
609 Fifth Avenue
New York, N. Y. 10017
PL 2-3770

MAXWELL OKUN
Of Counsel

(4689) COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

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PRELIMINARY STATEMENT

The decision appealed from was rendered by Richard Owen, U.S.D.J. and is reported in 382 F. Supp. 880.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue is whether Judge Owen properly concluded that Bela Bartok's musical composition entitled "CONCERTO FOR ORCHESTRA" (hereinafter referred to as the "CONCERTO") is a posthumous work within the meaning of Title 17 U.S.C. Sec. 24 (92a).*

The "effect" of Judge Owen's decision referred to in Appellant's Brief at Page 2, will be discussed hereinafter at Page 5.

* All references in parenthethis are to Appellant's Appendix unless otherwise indicated.

STATEMENT OF THE CASE

The nature of the case, and the proceedings and disposition in the Court below.

Plaintiff sued for judgment declaring that the "CONCERTO" is not a posthumous work and that plaintiff, his mother and brother (the composer's widow and sons) were entitled to the renewal term of copyright under Section 24 of the Copyright Act (17 U.S.C. Sec. 24) (Complaint p.6)

Defendant, BOOSEY AND HAWKES, counterclaimed and cross-claimed for judgment declaring that if the "CONCERTO" be declared to be a posthumous work, the United States renewal term of copyright thereof is vested in BOOSEY AND HAWKES, as proprietor of the copyright, subject to the payment of royalties earned by the "CONCERTO" in the United States during the United States renewal term of copyright to SUCHOFF as Successor Trustee under the composer's Will; and that if the "CONCERTO" be declared not to be a posthumous work, plaintiff's interest in the said renewal term of copyright is vested in BOOSEY AND HAWKES subject to the payment of the same royalties to plaintiff, his mother, and his brother (BOOSEY AND HAWKES' ANSWER pp 3,4).

Defendant, SUCHOFF, counterclaimed and cross-claimed for judgment declaring that the "CONCERTO" is a posthumous work, and that BOOSEY AND HAWKES is the copyright proprietor thereof and entitled to the renewal term subject to the payment of royalties to SUCHOFF, as Successor Trustee under the composer's Will (SUCHOFF'S ANSWER pp 4,5).

Plaintiff moved for summary judgment (3a) and defendants cross-moved for summary judgment (55a, 67a). (In the Court below, BOOSEY AND HAWKES took the position that the "CONCERTO" is a posthumous work.) Judge Owen granted defendants' motions for summary judgment and declared that the "CONCERTO" is a "posthumous" work within the meaning of Title 17 U.S.C. Sec. 24, and that the renewal term of copyright is vested in BOOSEY AND HAWKES as proprietor of the copyright in said posthumous work subject to the payment of royalties to SUCHOFF as Trustee under the composer's Last Will and Testament (103a, 104a).

The Facts

The "CONCERTO" was composed by Bela Bartok in 1943 (6a). All of the rights in this musical work, the copyright thereof, and the renewal copyright thereof, became vested in BOOSEY & HAWKES, LIMITED (the English affiliate of BOOSEY AND HAWKES) as publisher, subject to the payment of royalties, under an earlier exclusive writer's agreement dated the 25th day of May, 1939 (15a-20a), and a specific assignment from the composer dated November 25, 1943 (24a-27a).

The "CONCERTO" was published in London by BOOSEY AND HAWKES' affiliate on March 20, 1946* with the required copyright

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* The record (59a,60a,79a,81a) fully supports Judge Owen's findings explaining the delay in publication, and his conclusion that there is not "the slightest suggestion that Boosey delayed publishing of this work in order to cause it to be 'posthumous' ....." (94a,95a).

notice (8a,57a). United States copyright was thus secured under Section 10 of 17 U.S.C. The claim to copyright for the first term of twenty-eight years was duly registered in the United States Copyright Office in the name of BOOSEY AND HAWKES' affiliate, as proprietor, and a certificate thereof was duly issued on April 10, 1946 (57a,61a).

The composer died on September 26, 1945 (56a), prior to the date of publication and prior to date of copyright. The fact that he was deceased, is recited in the certificate of copyright registration (61a).

Within the period prescribed by Section 24 (17 U.S.C.) of the Copyright Act, BOOSEY AND HAWKES' affiliate applied for and received from the Register of Copyrights a certificate of registration of its claim to the renewal copyright as "proprietor of copyright in a posthumous work" (12a).

Within the same period, plaintiff as a "child" of the deceased composer filed with the Copyright Office an application to register his claim to the renewal copyright (10a).*

Plaintiff, prior to the commencement of this action, assigned all his rights, if any, in the United States renewal term of copyright in the "CONCERTO" subject to the payment of royalties by BOOSEY AND HAWKES to those who may be legally entitled thereto (57a,Appellant's Brief,p.5). Likewise, prior to the commencement of this action, the Executors of the deceased

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* The composer was survived by his widow, his son Bela, and his son Peter (plaintiff) all of whom were living at the end of the twenty-eighth year of original term of copyright.

composer (the predecessors in interest of the defendant, SUCHOFF) assigned all their rights, if any, in the United States renewal term of copyright in the "CONCERTO", subject to BOOSEY AND HAWKES' obligation to pay royalties to those who may be legally entitled thereto (57a,65a).

The said assignments are contained in one agreement which provides for the payment of the identical royalties by BOOSEY AND HAWKES to those who are legally entitled thereto (58a).

Whether or not the "CONCERTO" be a posthumous work, the copyright has been renewed by virtue of the filing of the applications by BOOSEY AND HAWKES and by plaintiff (10a-13a). The renewal is an accomplished fact and not a justiciable issue.

Whether or not the "CONCERTO" be a posthumous work, BOOSEY AND HAWKES is the owner of the renewal term of copyright subject to the payment of royalties. The ownership of the renewal term is not a justiciable issue.

The effect of Judge Owen's decision is, therefore, that all the royalties are payable by BOOSEY AND HAWKES to SUCHOFF, as Trustee, for the benefit of the composer's widow during her lifetime and on her death to plaintiff as sole remainderman free of any trust (68a,74a,75a).

On the other hand, if the "CONCERTO" were held to be not a posthumous work, the same royalties would be payable by BOOSEY AND HAWKES to plaintiff, the widow and the other son, in equal shares.

ARGUMENT

THE "CONCERTO" WAS FIRST PUBLISHED AND COPYRIGHTED AFTER THE COMPOSER'S DEATH AND IS, THEREFORE, A POSTHUMOUS WORK WITHIN THE MEANING OF 17 U.S.C. SEC. 24.

The composer died on September 26, 1945 (56a). The "CONCERTO" was first published and copyrighted on March 20, 1946 (8a,57a,61a). The copyright was originally secured by BOOSEY AND HAWKES' affiliate as proprietor (61a).

The relevant portion of Section 24 of the Copyright Act (17 U.S.C.Sec.24) reads as follows:-

> "The copyright secured by this Title shall endure for twenty-eight years from the date of first publication, ...: Provided, That in the case of any posthumous work ..... upon which the copyright was originally secured by the proprietor thereof ..... the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years ....."

1. An analysis of this Section leads to only one conclusion, namely, that "posthumous" - after death - relates to (a) the time when "the copyright (is) secured", and (b)"the date of first publication".

The juxtaposition of the word "posthumous" with the first clause of Section 24 compels this result. "Posthumous" appears nowhere else in the Copyright Act. It must be construed and defined within the context and plan of Section 24 (17 U.S.C.).

Copyright of the "CONCERTO" was secured under the provisions of Section 10 of the Copyright Act (17 U.S.C. Sec.10) by publication with notice of copyright after the death of the composer.

Publication of a musical work occurs "when by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such disposition does not in fact occur." Nimmer on Copyright Sec.49 (Citations omitted).

It is well established in copyright law, that public performance of a musical work, either in concert or by broadcasting, is not a "publication". Rosette v. Rainbo Record Manufacturing Corporation, 354 F. Supp. 1183, 1190 (S.D.N.Y. 1973); Ferris v. Frohman, 223 U.S. 424; McCarthy & Fischer Inc. v. White, 259 Fed. 364 (S.D.N.Y. 1919); Nimmer on Copyright, Section 53.1, Page 208; and Uproar Co. v. NBC, 8 F.Supp. 358 (Mass. 1934) Affd. 81 F.2d 373 (1936).

Nimmer, The Law of Copyright, states the rule (Page 208) as follows:

> "It is firmly established law that the oral dissemination or performance of a literary, dramatic or musical work does not constitute a publication of that work."

In no event, did the dissemination of the "CONCERTO" by performance in concert during the composer's lifetime, result

in an intelligible notation of the work in a form which others could see and read. (See White-Smith Music Publishing Co. v. Apollo, 209 U.S. 1 (1908).) Copyright of the "CONCERTO" could not have been obtained during the composer's lifetime by reason of performance alone.

Since performance cannot be a factor in securing copyright, and since performance cannot be a factor in fixing "the date of first publication", performance cannot be a factor in defining "posthumous".

2. The word "posthumous" is defined in Webster's New International Dictionary as "Published after the death of its author, as posthumous poems". This definition is characterized by Nimmer as "The accepted dictionary definition ....." (Nimmer on Copyright Sec. 114.1).

Ringer (now the Register of Copyrights) in her treatise, Renewal of Copyright (Copyright Office Study No. 31, p. 128) states:

> "The generally accepted definition of 'posthumous works' is one which is published subsequent to the death of its author'." *

The U.S. Copyright Office has defined a posthumous work as a "work first published and copyrighted after the death of the author". [See Par. B1 under the heading "WHO MAY CLAIM RENEWAL" which appears on the back of renewal certificate (13a).]

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* To the same effect, see: Bricker, Renewal and Extension of Copyright, 29 So.Cal. Law Review 23,38,39.

In the instant case, the "CONCERTO" was first published and copyrighted after the death of the author.

Judge Learned Hand in Shapiro, Bernstein & Co. Inc. v. Bryan, 123 F.2d 697 (2nd Circuit 1941) said at page 699:

> "The first class (referring to the first of the four classes enumerated in Section 24 (formerly 23) of the Copyright Act) provides for 'posthumous' works, i.e., those on which the original copyright has been taken out by someone to whom the literary property passed before publication."

This definition cannot be read literally. Obviously, Judge Hand intended to include in this statement, by implication the ordinary dictionary meaning of "posthumous", namely, "after death of the composer". Thus, Judge Hand's statement should be read as though he defined "posthumous" works as "those on which the original copyright has been taken out after death of the composer by someone to whom the literary property passed before publication".

Judge Hand's decision is the only judicial interpretation which we have been able to find of "any posthumous work", as used in Section 24 of the Copyright Act.

In her aforesaid treatise (Copyright Office Study No. 31, pp 128,129) Ringer concludes that Judge Hand's comment supports the accepted dictionary definition of "posthumous" and "probably represents a correct interpretation of the law".

Judge Owen points out in his opinion (100a,101a) that, in the field of music, "posthumous", for over 100 years, has been taken to mean published after the composer's death, though performed during his lifetime. Another example of such a posthumous work is Franz Schubert's "Overture in 'Italian Style', C Major Opus Posthumous 170". This work was not published until after Schubert's death in 1828, but had been publicly performed during his lifetime in 1818 (Notes on the Program, by Edward Downes, New York Philharmonic Concerts at Avery Fisher Hall, Lincoln Center, New York, on February 28, 1974, March 1, 2 and 5, 1974).

Hungarian, German, and other foreign definitions of the word "posthumous" are hardly relevant to the interpretation of an American statute.

3. Plaintiff's reliance on the British Copyright Act of 1956 (Appellant's Brief, p. 22 et seq) is wholly misplaced. Section 2(3) of that Act makes no reference whatsoever to the word "posthumous" or "posthumous work". An analysis of that Section, in fact, supports the use of the accepted dictionary definition of "posthumous" in interpreting our Section 24.

The reason for this is that under the British Act, the term of copyright is for the life of the author plus fifty years after death.* Section 2(3) of that Act extends that term to fifty years from the earliest date when publication, performance, offer of records for sale, or broadcasting occurs after

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* Under the British Act, copyright is "secured" upon creation of the musical work (Sec. 2(1)).

death, if none of these events occurred during the author's lifetime.

The use of these four specific acts or events in Section 2(3) without any reference to or use of "posthumous" or "posthumous work" as used in our Act, clearly demonstrates that the British Act does not attempt to define "posthumous".

It is interesting to note, however, that one of the acts which plaintiff relies on (Brief p. 37) for his definition of "posthumous", namely, that rights in the work were not assigned by the author but passed to his estate, is not one of those specified in 2(3) of the British Act. The use of the specific acts in Section 2(3) of the British Act when compared to the use of "posthumous work" in Section 24 of our Act, leads to the conclusion that our Act must be interpreted differently and in accordance with the accepted dictionary definition of "posthumous".

Furthermore, although the British Copyright Act has contained, at least since 1956, these four specific acts which if they do not occur during the composer's lifetime, extend the period of protection beyond 50 years after death, our Congress has not seen fit to amend, change or define the words "posthumous work".

4. The legislative history of the Copyright Act since 1909, confirms the acceptance by Congress of the definition of a "posthumous work" as a "work first published and copyrighted after the death of the author".

The decision by Judge Learned Hand in Shapiro, Bernstein & Co. Inc. (supra) was made in 1941. The definition which appears on the back of the renewal certificate (13a,Par.B1 under heading "WHO MAY CLAIM RENEWAL") has been in use for many years. Ringer's treatise, Renewal of Copyright (Copyright Office Study No. 31) was made in 1960, after the meaning of "posthumous work" had been discussed pro and con since 1944 (Study No. 31, pp 128,129). Study No. 31 was part of a series of such Studies begun in 1955 by the Copyright Office, at the request of Congress, to assist Congress in a comprehensive reexamination and general revision of the copyright law (Title 17 U.S.C.) (See Studies on Copyright, Arthur Fisher Memorial Edition, Vol. 1, XVII-XIX).

Nevertheless, Congress has never amended Section 24 of the Copyright Act to indicate disapproval of either Judge Hand's definition or the definition adopted by the Copyright Office, both of which are based on the generally accepted definition of "posthumous work".

Furthermore, Congress has continued to use the same identical words "any posthumous work", without change or alteration, in subsequent legislation relating to the revision of the Copyright Act. Thus, we find that Section 304 of the first Copyright Revision Bill (H.R. 2512) passed by the House on April 11, 1967, Section 304 of S. 543 introduced in the Senate on January 22, 1969, Section 304 of S. 1361 introduced in the Senate on March 26, 1973, and passed by

the Senate on September 9, 1974, Section 304 of S. 22 introduced in the Senate on January 15, 1975, and Section 304 of H.R. 2223 introduced in the House on January 28, 1975, all continue to use the same words "any posthumous work" as one of the classes relating to renewal copyright of existing copyrights in which the renewal vests in the "proprietor".

In view of the foregoing, can it be fairly said, as suggested by plaintiff (Brief p. 23) that it was a "possible legislative oversight" to include "posthumous works" in the first Proviso which grants the "proprietor" of such a work the renewal and extension?

5. The decision of the Court below conforms to the Congressional intent gathered from the pre-1909 hearings as well as from the enactment of Section 24 (17 U.S.C.) which followed.

The intent of Congress to preserve the renewal copyright term for the author and his family was expressed in the second Proviso of Section 24. However, that Proviso does not bar the composer from effectively assigning during the original term of copyright his renewal expectancy if he later survives the twenty-eighth year (Fred Fisher Music Co. Inc. v. M. Witmark & Sons, 318 U.S. 643 (1943); Rossiter v. Vogel, 134 F. 2d 908 (2d Circuit 1943).

Furthermore, any legislative intent which may be garnered from the pre-1909 hearings must necessarily give way to the express language of the first Proviso in Section 24.

In that Proviso, Congress meticulously carved out an exception which applies to four categories, one of which is "any posthumous work" and stated that in such a case the "proprietor" of the work is entitled to the renewal.

We suggest that if "posthumous" is to have a meaning other than that given to it by the Court below, it must be by legislative enactment. Such an enactment has never been and is not now contemplated by Congress (See supra pp 12,13).

Many copyrights of musical works have been renewed in the past by the proprietor of copyright in a posthumous work (in accord with the instructions of the Copyright Office) where the work was "first published and copyrighted after the death" of the composer (supra pp 8,12). If plaintiff's contentions be accepted, then in those cases where the work was performed during the composer's lifetime or assigned by the composer, the renewals filed by the proprietor will be void and the works thrown into the public domain retroactively. A renewal made in the name of one not entitled thereto is void and of no effect. (Von Tilzer v. Jerry Vogel Music Co., 53 F.Supp.191 (S.D.N.Y.1943); Tobani v. Carl Fischer Inc., 98 F.2d57 (2d Cir.1938); Yardley v. Houghton Mifflin Co. Inc., 25 F.Supp. 361 (S.D.N.Y. 1938) aff'd 108 F.2d 28 (2d Cir. 1939); Marks Music Corp. v. Borst Music Publ. Co., 110 F.Supp. 913 (D.C.N.J. 1953).)

This is not a case where the composer "sold his copyright outright". The publisher is obligated to pay royalties during the renewal term, just as it was obligated to pay

royalties during the original term (59a, 65a, 15a-18a). Under the decision of the Court below, these royalties are now payable to the widow for life and then to the plaintiff (son) as provided by the composer in his own Last Will and Testament (supra p. 5). The composer's family has been well provided for.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

FISHBEIN & OKUN
Attorneys for Appellee,
Boosey and Hawkes, Inc.
609 Fifth Avenue
New York, New York 10017

By: _____
MAXWELL OKUN
A Member of the Firm